Royal Development Company, Limited *and* Joseph E. Schmidt. Case 37-CA-1597

September 3, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 9, 1981, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, counsel for the General Counsel filed limited cross-exceptions and an answering brief to Respondent's exceptions, and Respondent filed an answering brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Royal Development Company, Limited, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to hire or otherwise discriminate against employees because they engaged in protected concerted activity, including the filing of grievances under the collective-bargaining agreement and the filing of unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT discourage membership in the Union, or any other labor organization, by discriminating against employees in regard to their hire and tenure of employment or any terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Joseph E. Schmidt immediate employment to a position in which he would have been employed had we not discriminated against him or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and make him whole for any loss of earnings he may have suffered due to the discrimination practiced against him, with interest.

ROYAL DEVELOPMENT COMPANY, LIMITED

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was head before me at Honolulu, Hawaii, on August 5 and 6, 1980,[1] pursuant to a complaint issued by the Re-

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

In par. 1 of the Administrative Law Judge's findings of fact, she found that Respondent is a Nevada corporation. Respondent excepts to this finding, asserting that it is a Hawaii corporation and that it admitted same in its answer to the complaint. Inasmuch as the General Counsel has not excepted to this assertion and there is no evidence to the contrary, the findings of fact regarding Respondent's business are hereby corrected to read that Respondent is a Hawaii corporation.

[2] We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(1), (3), and (4) of the Act by discriminatorily refusing to rehire Joseph E. Schmidt both because he engaged in union and other protected concerted activities and because he filed an unfair labor practice charge with the Board. We note, however, that the Administrative Law Judge used the causation test set forth in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to analyze Respondent's motivation for both the 8(a)(3) and the 8(a)(4) complaint allegations. In the absence of proof that Respondent relied on any legitimate reason for refusing to employ Schmidt, we find no need to decide here whether the *Wright Line* test of dual-motivation discharges is appropriate for analyzing 8(a)(4) cases.

Member Jenkins would not, contrary to the Administrative Law Judge, rely on *Wright Line*, to find the 8(a)(3) violation because she found the asserted lawful reasons for the discharge to be pretextual; thus the only genuine reason for the discharge is unlawful, and the *Wright Line* analysis, designed to weigh more than one genuine reason, is irrelevant and misleading.

[1] All dates herein refer to 1979 unless otherwise indicated.

gional Director for the National Labor Relations Board for Region 20 on March 14, and which is based upon a charge filed by Joseph E. Schmidt, an individual, in Case 37-CA-1597 on January 17, as amended on March 11, 1980. The complaint alleges that Royal Development Company, Limited (herein called the Company or Respondent), has engaged in certain violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended (herein called the Act), by refusing to hire Schmidt because he filed a charge with the Board, filed grievances, and engaged in other concerted protected activity.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed on behalf of the General Counsel and Respondent.

Preliminary Matters

On December 11, Schmidt filed a motion to strike Respondent's brief based upon Respondent's failure to serve him with a copy of its brief in contravention of the requirements of Section 102.42 of the Board's Rules and Regulations, as amended. Respondent, in reply to the motion, dated December 12, does not assert that Schmidt is not a proper party or that it effected service on Schmidt. Rather, it is concluded that the Board agent acting on behalf of the General Counsel was Schmidt's representative and that service upon the Board constituted service on the Charging Party. Respondent's reply further noted that a copy of its brief was being forwarded to Schmidt in the event he wished to assist the Board's agent in the preparation of any exceptions to the decision. In reply, the Charging Party asserts his independent right to participate in the proceeding, which Respondent, by its actions, failed to recognize. The Charging Party claims that the failure to comply with Section 102.42 has prejudiced Schmidt "in [his] efforts to police Respondent from taking liberties with the record evidence."

In a subsequent correspondence dated December 18, Schmidt indicated that he received a copy of Respondent's brief several days after he filed the motion to strike the brief; and alleged that Respondent "has intentionally withheld a copy from me in the hope of prejudicing my rights in this case, preventing me from having a copy of the brief in my personal possession to work with at leisure and, should I be so inclined, to file a reply." The Charging Party further asserts that a "rapid scan" of Respondent's brief "indicates to my mind that substantial and excessive liberties have indeed been taken with the record evidence by counsel for Respondent." The Charging Party did not file a brief, nor did he request leave to file a reply brief to discuss the "substantial and excessive liberties" Respondent allegedly took with the evidence of record.

Considering that Schmidt did receive a copy of Respondent's brief, albeit late; that the Charging Party did not file a brief nor indicate an intent to file a brief; and since the Rules and Regulations do not provide for the filing of reply briefs, Schmidt's avowed intent to review Respondent's brief before determining if he would indeed file a reply is a course of action not contemplated in the applicable Board Rules and Regulations; and consequently, it is concluded that Schmidt failed to show that he was prejudiced by Respondent's failure to serve him with a copy of its brief. Under these circumstances, Respondent's failure to timely serve Schmidt with a copy of its brief does not require that the brief be struck. Accordingly, the motion is denied.

Another preliminary matter relating to briefs is the late-filed addition to Respondent's brief, dated October 22, 1980, and received October 27. Although there was no motion to strike filed by any party regarding this material, in order to insure rational and timely pleadings and processing of the proceeding, this material will not be considered in this matter.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Nevada corporation which operates a chain of movie theaters out of its main office and place of business located in Honolulu, Hawaii. It further admits that during the past year, in the course and conduct of its business, its gross volume exceeded $500,000 and that annually it purchased and received goods and materials valued in excess of $10,000 from suppliers located outside of the State of Hawaii. Accordingly, it admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Local No. 665, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent, between January 1, 1973, and August 15, 1979, operated the Sunset Drive-In, the Waialae Drive-In, the Royal in Waikiki, the Royal Marina, the King, and the Queen Theaters.[2] The Charging Party worked for Respondent at all their theaters since 1973 and was assigned as a regular projectionist until November 1978, when he was laid off because Respondent's operating schedule was reduced.[3] After November 1978, Schmidt

[2] According to Frank R. Miller, a vice president and an admitted supervisor with Respondent, after August 15, 1979, the Company ceased operating the Queen Theater. Operations of the Queen Theater were conducted for a portion of the time here pertinent by another company, Golden Harvest, pursuant to a lease agreement which included a sublease by Golden Harvest to Yuclan.

[3] There is no contention that this layoff was improper.

was employed by Respondent as a regular relief and casual projectionist until August 15, 1979.[4]

After Schmidt's layoff by Respondent in 1978, Vito Petroni[5] scheduled him "for a regular[6] number of hours at the Queen Theater." The Union does not have a contract with the operator of the Queen Theater. The record does not clearly reflect the actual ownership and/or operator of the Queen Theater on the dates pertinent herein. Initially, Miller testified that beween January 1, 1977, and August 15, 1979, Royal Development operated the Queen Theater and, after August 15, 1979, Respondent severed its relationship with the Queen Theater. The actual operation of the Queen Theater appears to be pursuant to a lease between Respondent and Golden Harvest Hawaii, Ltd., who operated the theater during Schmidt's 1978 and 1979 employment until approximately August 14, 1979, when the lease expired. The theater was then sold to Yuclan. The new operator of the theater fired Schmidt. No representative of either Golden Harvest or the new owner, Yuclan, testified and there is no allegation that Schmidt's discharge on or about August 15, 1979, from, employment at the Queen Theater violated the Act.

Schmidt's immediate supervisor during 1978 and 1979 was Petroni, the Company's chief projectionist, who prepared the work schedule for the theaters owned by Respondent plus those theaters owned by Golden Harvest, Nippon, and Yuclan.[7] During March or April 1979, Schmidt was assigned work as a relief projectionist by Petroni at the King Theater to act as partial replacement for the regular projectionist, Derek Parker, who was ill.[8] Parker died without returning to work and his full schedule was reassigned to regular projectionist David Ohata[9] on August 15, 1980. This reassignment terminated Schmidt's employment with Respondent and he has not been rehired. The General Counsel contends that the failure to rehire Schmidt is motivated by his having engaged in concerted protected activity.

[4] As defined in sec. 13 of the contract between Respondent and the Union:

(a) A regular projectionist shall be defined as a projectionist who is regularly assigned a minimum of 30 hours per week during a calendar month. Each regular projectionist shall be offered a minimum of 36 hours per week.

(b) A regular relief projectionist shall be defined as a projectionist who is regularly assigned a minimum of 3 shifts per week during a calendar month. Medical and dental benefits shall be on a contributory basis.

(c) All other projectionists shall be deemed casual projectionists and shall not be eligible for fringe benefits, except the pension plan.

[5] Petroni is Respondent's chief projectionist and the Company admitted the allegation in the complaint that he is a supervisor within the meaning of the Act.

[6] Thirty hours a week. However, the Queen was not considered to be one of Respondent's theaters.

[7] The Union does not have a hiring hall; so, according to Petroni, pursuant to the Union's request, since 1972 Petroni used the list he had available through the Company to schedule the projectionists for these other theater owners.

[8] Two other projectionists were also assigned to replace, in part, Parker.

[9] Ohata is senior to Schmidt and the assignment of Parker's schedule to him is not alleged to be violative of the Act.

B. *The Alleged Concerted Protected Activity*

The agreement between the Company and Union provides, in article IV, for a grievance procedure. Pursuant to this provision, Schmidt presented a series of grievances and/or complaints about Petroni and the method he employed in scheduling projectionists. The first grievance was filed with Petroni. Petroni was not listed as a member of the grievance committee. It appears that prior to presenting these complaints Petroni and Schmidt were friends. During 1978, commencing around June 15, Schmidt mailed a grievance to Petroni asserting that one projectionist, Arthur Wheeler, was scheduled to work between 50 and more than 60 hours a week at the Royal Marina Theater, where Schmidt was working only an average of 24 to 26 hours per week. Schmidt protested what he referred to as the favoritism being shown Wheeler to his prejudice at the theater and he requested that he be assigned about 40 hours per week.

On June 20, 1978, Schmidt wrote Miller, stating that he was filing a grievance protesting the handling of the June 15 grievance by the chief projectionist, Petroni, who failed to supply a written response, and when Schmidt tried to discuss the matter with Petroni telephonically, Petroni assertedly stated, "You have no right to file any grievance" and then "slammed the phone and hung up on me." A copy of the original grievance was enclosed and Miller was informed that Schmidt requested that the June 15 grievance be handled at the second step of the grievance procedure. Copies of both these letters are sent to the Union's business representative, Sammy K. Arashiro.

On June 30, 1978, Schmidt sent another letter to Miller stating that he had not received a reply to his June 20 grievance or the initial grievance of June 15, 1978. The letter continues as follows:

> I expressed concern to you as to whether or not Mr. Petroni's actions represented Company policy and a carrying out of your intentions as to the treatment of employees. To elaborate on this further, sometime during the month of March, I was verbally informed by Mr. Petroni that he was—and I quote verbatim—"Second in command in the Company" under yourself. It is reasonable to assume that employees will accept statements made to them by supervisors to be correct, especially in the absence of any official memorandums to the contrary from management.
>
> I must emphasize to you again that I am concerned as to whether or not Vito Petroni's actions represent Company policy. This is going to be one of the factors which will determine how I will further pursue the case of the initial grievance, if it becomes necessary for me to do so.
>
> You are presently engaged in the task of trying to rescue a floundering Company and getting it on a paying and profitable basis. As a man with a personal background in small business, I fully understand more so than most people, probably, what you are going through and what some of the problems are. I

certainly don't want to be one who will add to these problems.

Although I don't have a direct financial interest in Royal Development, if I did there is something over which I would be extremely concerned at the present time, in the light of facts which are known to me. And it is this: Vito Petroni occupies a full-time position with a competing company. I "guesstimate" that he will earn about $25,000 or more this year from Consolidated Amusement. While I cannot say for certain whether or not there is a conflict of interest situation, there is an old saying: "No man can serve two masters."

While there is no documentation relative to the disposition of these grievances, Schmidt asserts that prior to sending the June 30, 1978, letter, he received a letter with a different schedule for the projectionists at the Marina Theater, which he considered to be in response to the June 15 grievance. However, when asked if the June grievance was resolved under the grievance arbitration provision of the contract, Schmidt stated that the "Union sided with the Company and ruled against me."

On July 26, 1978, Schmidt filed an unfair labor practice charge alleging that the Company reduced his hours of employment and changed his job classification because of his union activity, including the filing of grievances; and that for the preceding 6 months, a member of management has functioned as the union shop steward in violation of Section 8(a)(1), (2), and (3) of the Act. On August 16, 1978, the Regional Director of Region 20 dismissed the charge. The dismissal was not appealed.

On October 6, 1978, Schmidt sent a letter to Herbert Alameda, president of the Union, demanding that the Union file a written grievance on his behalf with the Company seeking 3-1/4 hours' backpay since he received an assignment and pay for only 32.75 hours while the contract provides that a regular projectionist be offered at least 36 hours' work per week.

On October 9 and 11, 1978, Schmidt made a similar written demand of Alameda for 3-1/4 hours' backpay for the pay periods ending October 3 and 10, respectively. On October 12, a similar demand was addressed by Schmidt to Alameda for the months of May through September plus the weeks of October 3 and 10, 1978. The total backpay claimed was $855.84.

On October 13, Miller hand delivered to the Union the following missive:

GENTLEMEN:

Since it has come to our attention that Joseph Schmidt has once again filed a grievance against us, we would like to state that this grievance has no merit and is simply a repeat of previous grievances which have no foundation.

According to our contract, Mr. Schmidt is entitled to and we must give him thirty-six (36) hours of employment each week. The scheduling of these hours is our prerogative according to the contract.

We feel that there has been no attempt on our part or by our representative, Vito Petroni, to not show good faith and cooperation with Mr. Schmidt; rather, we have made him friendly overtures and offered him additional shifts at various theatres, which was unsatisfactory to him.[10]

Mr. Schmidt's contention represents an attempt to subvert the contract and his continual harrassement [sic][11] can no longer be tolerated.

On October 17, 1978, Schmidt demanded that the Union file a grievance for 3-1/4 hours' backpay for the pay period ending October 17, 1978. Similar written demands were made on October 24 for the work week ending October 24, and October 31 for the work week ending October 31. There was no documentary evidence persuasively demonstrating that these letters were or were not communicated to the Company unlike the prior grievances mentioned in Miller's October 13, 1978, letter.

Miller, on November 17, 1978, sent the following letter to the Union:

Gentlemen:

Due to the discontinuance of the matinee policy at the Marina and Royal Theatres, there will be a reduction in the number of work shifts available to the regular projectionists. Therefore, we have had to eliminate all casual and relief projectionists. It has also become necessary to change the status of Joe Schmidt from that of a "regular" projectionist to that of a "regular relief" projectionist in accordance with Section 10 of the contract referring specifically to his lack of seniority; he being the last man hired.

We are preparing a new work schedule for all of our theatres and you as well as the projectionists will receive the new schedule one week prior to the effective date.

It would be appreciated if you would convey the above to Joe Schmidt by a copy of this letter.

The last paragraph of this letter is indicative that Respondent had cognizance of Schmidt's grievances and infers knowledge of the grievance filed subsequent to October 13, 1978.

During the summer of 1979, approximately in July, Schmidt informed other projectionists that a memo issued regarding the volume to be set while showing the film "Rocky" should not have to be followed, that each projectionist should determine the appropriate sound level. This activity by Schmidt was related to Petroni by several of the projectionists. As will be discussed more fully hereinafter, Schmidt was characterized by Petroni as constantly complaining about regulations, the rules set by the Company stating "how projectionists should operate, and complaining that Petroni's scheduling of projectionists was based upon favoritism." Schmidt testified, without refutation, that he continued to complain to Petroni that he was practicing favoritism in his scheduling to Schmidt's disadvantage from June 1978 until August

[10] The number and nature of these offers were not mentioned on the record.

[11] The person or persons assertedly harassed were not disclosed on the record.

1979. In addition to complaining about favoritism in scheduling, Schmidt complained to Petroni about Petroni being overbearing and intolerant.

C. *The Alleged Improper Refusal To Hire Schmidt*

While Schmidt was still working at the Queen Theater, Respondent hired, in March or April, three projectionists on a casual basis to substitute at the King Theater for Derek Parker, who had become ill. Schmidt was one of the casual projectionists employed at this time and he was given two of Parker's six shifts. The testimony regarding what occurred after Schmidt was employed as a casual projectionist at the King Theater is very disparate.

It is undisputed that in July 1979 there was a change in the shift schedule at the King Theater, and one of Schmidt's shifts was assigned to David Ohata, who was senior to Schmidt. Shortly before August 15, Petroni told Schmidt that all of Parker's shifts were being given to Ohata who was employed by Respondent as a regular projectionist. Parker had died leaving an opening for a regular projectionist at the King Theater which Ohata was assigned. The date and cause of Parker's death was not established on the record. It is undisputed that Schmidt was the last full-time projectionist laid off by the Company.

1. Schmidt's version of the events leading to his termination and subsequent occurrences

According to Schmidt, in March or April 1979, Petroni telephonically informed him that Parker was on sick leave and that there appeared to be an opening for a full-time projectionist and suggested that Schmidt return to Royal Development on that basis. Schmidt inquired if there actually was a permanent opening since Parker was on sick leave. Accordingly, Schmidt suggested that he return to work at the King Theater on a part-time basis until the matter of Parker's return was resolved. Petroni adopted Schmidt's proposal. Shortly before August 15, Petroni called Schmidt and told him that David Ohata had requested and was being given Schmidt's only shift at the King Theater for Ohata had seniority. No other reason for the schedule change was given and Schmidt did not file a grievance about the loss of employment for he did not know that there was a possibility of impropriety of motive in the Company's decision at that time.[12] It is undisputed that Ohata is senior to Schmidt and he was employed by Respondent as a full-time projectionist working at two drive-in movie facilities owned by Respondent prior to assuming Parker's duties. Petroni informed Schmidt that he should not worry about the loss of the shift because he would be making up a new shift and would schedule Schmidt to work somewhere.

On August 15 or 17,[13] Schmidt telephoned Petroni at the Pearl Ridge Theater and inquired when he would be scheduled for more work for Royal Development. Schmidt was discharged from his position at the Queen Theater on or about August 14. At that time, Petroni told Schmidt that he would be unable to give him any work with Royal Development because "Mr. Miller was thoroughly and completely fed up with me and did not want to have anything further to do with me . . . that I had dragged him [Miller] through hell with all that nonsense with the National Labor Relations Board, and I was completely wrong in all of that and I had no case to begin with. . . . He [Petroni] said that I had caused Mr. Miller an enormous amount of trouble in the past . . . that Mr. Miller had a file on me three inches thick at the office, and I asked Mr. Petroni what was contained in this file, and I was told that that was none of my business." Petroni did not define the "trouble" Schmidt caused by reference to specific grievances, he only specified the filing of a charge with the Board. Schmidt asserts that Petroni did not say during this conversation that either Miller or Petroni did not want to reemploy Schmidt because of the accusations he made concerning Petroni, nor was there any reference to Schmidt's competence as a projectionist. The Charging Party denies telling Petroni to lay off employees to make a place for him during this conversation, claiming that he simply informed Petroni that he felt he had seniority over some casual or relief operators who had been scheduled to work and he should be given their shifts. It is undisputed that the contract does not require consideration of seniority in hiring casual and relief projectionists. Schmidt asserts that Petroni, during earlier conversations, indicated that he considered seniority in scheduling casual and relief projectionists. However, he did recall that Petroni stated during this conversation that he believed that the Company would be subject to grievances if he "bumped" employees to make room for Schmidt.

Also on August 17, 1979, Schmidt filed a grievance with Miller which stated:

> A few days ago, I attempted to discuss this with Mr. Petroni in a telephone conversation. Mr. Petroni said: "I will be unable to ever get you a full-time position or give you any work with the Company again because Mr. Miller is completely fed up with you and doesn't want to have anything whatsoever to do with you. You have caused *him* an enormous amount of trouble in the past and we

[12] Art. I, sec. 10, of the contract provides as follows:

> Seniority shall be based on continuous service as a regular projectionist with ROYAL DEVELOPMENT COMPANY, LIMITED and its predecessor. When a regular relief projectionist is classified as a regular projectionist this projectionists past years of continuous service shall be recognized and credited toward seniority on the basis of total hours worked. Each 36 hours worked shall be equivalent to one (1) week seniority. When such seniority is equal, the date of employment with the old Consolidated Amusement Company, Ltd. shall determine seniority. All layoffs and rehiring of employees under this agreement shall be in accordance with the rule of seniority; that is, on a layoff, the last employee hired shall be the first to be laid off, and on a rehiring, the last employee laid off shall be the first to be rehired, provided that the employee is qualified to perform the requirements of the job. The Company shall determine the qualifications of all employees for the job and shall consider recommendations from the Union. Where all of the qualifications (such as ability, performance, punctuality, attendance, physical and mental fitness) are relatively equal, seniority shall govern.

[13] Schmidt was unclear as to the dates some of the conversations occurred; however, given the number of conversations and the elapsed time, such lack of accuracy, standing alone, does not destroy or impair his credibility.

have a file on you three inches thick at the office." [Emphasis supplied.]

Mr. Petroni has hired a considerable number of other projectionists. I have both Company seniority and Union seniority over all of these individuals, and my rights of seniority conveyed under the collective bargaining agreement have been unilaterally and summarily denied and taken away from me by Mr. Petroni.

I hereby protest the apparent termination of my employment with the Company by Mr. Petroni, and ask that I be immediately restored as a Regular Projectionist with the Company, receiving full fringe benefits.

As Mr. Petroni is your official spokesman and to all visible appearances possesses full management authority for the Company, I also desire to have an opportunity to discuss your attitudes towards me (as expressed for you by Mr. Petroni), with you in person, in a meeting at which the Union Steward, Henry Yamamoto, shall be present, and at least one officer of the Union. I am unable to understand your attitude, I believe it is completely unjustified, and if it is truly as it has been represented to me, it may be the product of inaccurate information given to you.

I also desire to be given the opportunity to examine the purported file "three inches thick" that is maintained on me in the office, in order that any misinformation therein may be corrected.

The next conversation between Schmidt and Petroni occurred on or about August 18, 1979.[14] Schmidt claims Petroni indicated he was dissatisfied with his "situation in life," that he was "tired of doing Frank Miller's dirty work, and he was tired of being lied to by Miller." There was no elaboration concerning the cause of the asserted dissatisfaction. Petroni then repeated "that there would be no work for [Schmidt] in Royal Development . . . he emphasized again that I was not to be hired because of all the 'trouble' I've caused." Schmidt then inquired if his work had been unsatisfactory and requested Petroni to tell him if anything was wrong with his work. Petroni reiterated his prior statement that Miller had a 3-inch thick file on Schmidt.[15] Petroni also stated the question of Schmidt's reemployment was now out of his hands and was an issue solely between Schmidt and Miller. Also during this conversation, Petroni, according to Schmidt, stated that there was nothing seriously wrong with his work. Schmidt then informed Petroni that the issue of his competence could be very important, and he may ask Petroni to testify on his behalf one day. In reply, Petroni said: "[I]f he was ever asked he could verify that I [Schmidt] was a competent projectionist." It was also asserted that Petroni said, "he had been instructed by Mr. Miller that I was not to be hired, and I was not to be scheduled anywhere."

On August 23, 1979, Miller responded to Schmidt's August 17 grievance as follows:

> Your request for immediate restoration as a regular projectionist with Royal Theatres is being denied. Seniority governs the granting of preference of employment only when all qualifications of all candidates for the position are relatively equal. Such is not the case in your situation and I shall exercise and accept the responsibility for the right to hire Royal's projectionists.
>
> I cannot respond to the other conclusions, references, conversations and attitudes contained in your letter as they do not relate to facts nor was I present or a party to such inter-actions between yourself and Mr. Petroni.

On August 25, Schmidt again telephoned Petroni to confirm his prior opinion about the quality of Schmidt's work and Petroni told him "that there is nothing that could possibly be so wrong with my work as a projectionist to justify the way I was being treated." Schmidt then repeated his inquiry as to why he was not being hired and Petroni said he "was not to be rehired because he [Petroni] had been told by Mr. Miller that I [Schmidt] was not to be scheduled. "They then discussed the schedule Petroni was preparing, to be effective September 1, when Petroni said, "that in his opinion I was the projectionist who should be working whatever relief or vacations that might be available and that he was going to put my name down on their schedules with a note indicating that I was the projectionist who ought to be working. But he said that Miller would not like this." Also during this conversation when the subject of Schmidt being scheduled for work was again raised, Petroni said, "I am out of this now and it's between you and Miller." Additionally, Petroni indicated that the Company's file on him did not contain any derogatory material.

Subsequent to August 25,[16] Schmidt and Petroni had several conversations about the grievances he filed and during one discussion Petroni stated that there would not be any work for him. Also during this conversation Petroni stated that Schmidt did not have seniority. Schmidt also testified to various other conversations occurring in September and October during which the Company apparently took the position that seniority was not in issue but rather that Schmidt was not qualified. According to Schmidt, the question, by the Company, regarding his qualifications did not arise until well after he was told he would not be reemployed on August 15.

During his testimony Schmidt admitted that he and Petroni had strongly differing opinions on some points but that they could get along. Schmidt did not know of any other projectionist for Respondent that accused Petroni of showing favoritism in scheduling. From June 1978 to August 1979, Petroni never complained or ex-

[14] Schmidt's affidavit does not mention a conversation occurring on August 17; it is probable that the Charging Party confused these conversations and that this conversation occurred on August 18. Schmidt indicated that he confused the dates and subject matter of these conversations.

[15] During a subsequent conversation, Schmidt again asked Petroni what the file contained and was told only his letters and complaints, nothing else, that there was nothing derogatory in the file.

[16] Schmidt could not recall the exact dates; he opined one conversation occurred a few days before September 11.

pressed dissatisfaction about Schmidt's work as a projectionist, although once Petroni mentioned that Schmidt should make an effort to be at work on time and Petroni did make an occasional remark about Schmidt's neatness at his worksite. The approximate dates of these remarks was not a matter of record, hence the inference that these remarks are supportive of Respondent's assertion that Schmidt's work was unsatisfactory cannot be made for their relevance as to time and import has not been established.

2. Respondent's version of the events leading to Schmidt's termination and subsequent occurrences

Prior to discussing Respondent's rendition of the facts, the validity of Petroni's affidavit, particularly page 5a, will be determined. Throughout much of his testimony, Petroni attempted to disavow portions of the affidavit presented by him to the Board's agent during the hearing. In particular, Petroni contends that he did not make the statements on page 5a thereof. This disclaimer is not credited based upon Petroni's admission that the name Herb Alameda was written on page 5a by his hand; the admission that initials appearing next to two written modifications on the page were his, although he would not admit to writing these initials; the fact that the affidavit would not make sense substantively without this page; and the fact that Petroni tried to disavow or mitigate the import of this as well as other portions of the affidavit although he admitted being instructed to read it carefully before signing and stated that he complied with those instructions. Therefore, page 5a of the affidavit is found to be an original integral part of the statement Petroni made to a Board agent.

According to Petroni's testimony, when Parker became ill, Schmidt was one of several relief and casual projectionists scheduled to assume Parker's shifts. Ohata was one of those working some of Parker's shifts at the King Theater as well as working shifts at two of the Company's drive-in theaters. It is undisputed that Ohata had more seniority with the Company than Schmidt. The third projectionist that was assigned to assume a portion of Parker's work was Jack Hazel, who had been working as a relief operator at the King Theater about a year before Parker's illness, or since late 1977 or early 1978.

Contrary to Schmidt's testimony, Petroni asserts that he did not offer Schmidt Parker's shifts as a regular projectionist until after Parker died. In support of his version, Petroni averred that he did not know whether Parker would return to work since he did not know the nature of the illness, hence he had no opening to fill. Since Schmidt was the last regular projectionist laid off, Petroni decided that he had to offer him Parker's shifts when the opening did occur. Ohata, at the time of Parker's death, was number 4 on the seniority list while, according to Petroni, Schmidt was number 12.

Schmidt, Petroni asserts, refused to take the regular projectionist position at the King Theater because he had the job at the Queen Theater. Accordingly, Ohata was offered the regular projectionist position at the King Theater and Hazel was retained as the relief operator. Schmidt lost the two shifts he had been working at the King; one was assumed by Ohata in July, and the second by Ohata on August 15, 1979.

Why Ohata, who was very senior to Schmidt, was not offered the job initially was not explained on the record. Also unexplained is why Schmidt, who was working at the Queen Theater which, although unsure, Petroni believed "would count as seniority for Royal Development,"[17] required reinstatement over Ohata on a priority basis. Another unanswered matter is that Petroni, in his affidavit, mentioned that Joe Schmidt simultaneously worked at two theaters on a full-time basis during 1975; but for some unexplained reason he would or could not duplicate this work schedule in 1979. Petroni indicated that generally when he offers shifts to projectionists, he attempts to fit in existing assignments with newly scheduled work and failed to state that a similar practice was not possible in the case of Schmidt's work at the Queen, and the offer of regular work at the King. In fact, the genesis of Schmidt's complaints was the seeking of additional scheduled hours, and no basis for a change in this attitude was demonstrated herein.

Initially, Petroni testified that when he gave Ohata the full-time projectionist job at the King, he offered Schmidt the relief shifts Ohata was previously assigned at the drive-in theaters and asserts that Schmidt stated he did not want the relief shifts, that he wanted to work at the King or Marina Theaters. Petroni clearly testified that he offered Schmidt Ohata's relief shifts when he gave Ohata the full-time job at the King Theater. However, later in his testimony, Petroni stated that after offering Schmidt the full-time position, which he turned down, the Company met its contractual obligations to him and there was no longer any work available for him, they had no further obligations to him. If there was no work available and Respondent had met all its responsibilities to Schmidt solely by offering him the regular position at the King, then why did Petroni claim to have offered him Ohata's regular relief schedule. Furthermore, Petroni later testified that the Company offered Schmidt a lot of different shifts at the time Ohata took over Parker's regular projectionist position, then testified he offered him the two shifts formerly handled by Ohata, one at the Royal Sunset and the other at the Waialae; subsequently, he modified his prior testimony and said he did not recall stating he offered Schmidt a lot of different positions, and did not recall exactly what was offered, if anything, after his alleged refusal of Parker's job. This inconsistent contradictory testimony, as noted hereinafter, leads to an inference that the decision to not hire Schmidt was improperly motivated.

After Schmidt lost his position at the Queen Theater, Petroni stated that he could not offer him any position because there was no work for him in August 1979. However, in his affidavit, Petroni stated:

> Beginning in August 1979 and to the present time as I have already mentioned certain opportunities for employment have come up as a relief projectionist. I probably would have scheduled Joe Schmidt for

[17] Page 2 of Petroni's affidavit.

this work except for the fact that the company no longer wants to employ him.

Petroni admitted telling Schmidt that Miller no longer wanted him working for the Company, "for Mr. Miller was aggravated with Mr. Schmidt because of his constant complaining and his harassment of Mr. Miller," but denies ascribing as the basis for the decision not to hire Schmidt reasons such as his filing charges against the Company with the NLRB or filing grievances. On page 5a of Petroni's affidavit, the following statement appears:

> There are essentially two reasons why Royal Development does not want Schmidt as an employee; one, Mr. Miller has told me he has grown tired of all the trouble Schmidt has caused over the years. This trouble has resulted in Schmidt filing grievances against the company as well as charges against the company with the NLRB. Miller has told me he is not upset over the fact that the grievances and NLRB charges are filed by Schmidt but rather that the grievances and the charge have no basis in fact and that the allegations made by Schmidt in the grievances and the NLRB charge were completely untrue. In fact all of Schmidt's grievances have been found to lack merit and the NLRB charge was dismissed for lacking merit.

Furthermore, Petroni admitted telling Schmidt that Miller had informed Petroni that Miller had grown tired of all the trouble Schmidt had caused over the years. The affidavit continues as follows:

> The second reason why the company no longer wishes to employ Joe Schmidt is because, in my opinion and in the opinion of Frank Miller, he is just not a competent projectionist. Certain incidents have occurred over the past years that have led us to draw this conclusion. Some of the matter I have talked about already. For instance, Joe Schmidt seems to occupy a lot of his time in the booth with some sort of personal projects. For instance, I know that at some of the locations he has brought in a typewriter and he will do typing while he is in the projection room.

Although Petroni denies Schmidt's contention that the chief projectionist considered him competent, Petroni never claimed that he told Schmidt that one of the considerations in the decision to not hire him was lack of competence or any other reason related to the performance of his duties as a projectionist.

Both Miller and Petroni attempted to explain the decision not to hire Schmidt because of Schmidt's repeated harassment of Petroni. Miller depicted the harassment as being much more problematical than Petroni. For example, Miller testified that Petroni often bothered Miller during the weekends to complain about Schmidt's troublesome complaints. Petroni's testimony did not entirely support Miller's statements. Although Petroni did say that he was becoming very upset over Schmidt's repeated complaints, only Miller initially raised the specter of Petroni resigning his position as chief projectionist, and Petroni did indicate that he would have assigned Schmidt some work if not for Miller's directive that Schmidt not be hired, a statement that tends to dispel any visions assertedly held by Petroni of inability to work with Schmidt or of a decision by Petroni to avoid all future contact with Schmidt, even if he had to resign his position.

Furthermore, the statements by Petroni, which I credit as consistent and inherently probable, to the effect that he would have offered Schmidt a job "except for the fact that the Company no longer wants to employ him" contradicts Miller's and Petroni's other testimony that there was no work to be offered; and, that they did not have any vacancies that Schmidt could fill.

Respondent asserts that Schmidt's activities were solely for his own aggrandizement and, hence, were not concerted. There is no question but that the collective-bargaining agreement which Schmidt sought to have enforced, including the scheduling of a specified number of hours, was in effect at the time the grievances were lodged in this case. See *Interboro Contractors, Inc.*, 157 NLRB 1295 (1965), enfd. 388 F.2d 495 (2d Cir. 1967), which stated:

> [T]hat complaints made for such purposes [enforcing] the provisions of the existing collective-bargaining agreement are grievances within the framework of the complaint that affect the right of all employees in the unit and thus constitute concerted activity which is protected by Section 7 of the Act. (See further, *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).)

The protection accorded employees under *Interboro Contractors, Inc.*, is not dependent upon either a correct interpretation of the contract or the validity of the complaint. *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975); and *The Singer Company, Climate Control Division*, 198 NLRB 870, fn. 5 (1972). That several of the grievances dealt with Petroni's method of assigning work to Schmidt alone does not remove the activity from the protection of the Act since the subject matter is grievable under the contract which permits discussions of wages, hours, and other terms and conditions of employment with a bargaining unit member's immediate supervisor. Therefore, this activity of filing a grievance is protected by Section 8(a)(1) of the Act. See *The Detroit Edison Company*, 241 NLRB 869 (1979).

D. *Position of the Parties*

Initially, Respondent contends that the decision to refuse Schmidt further employment after August 15 was based upon Miller's concern over losing Petroni's services. As indicated above, Petroni's testimony does not support these contentions, as Petroni's willingness to assign schedules to Schmidt but for Miller's decision indicates, as well as the failure of Petroni's testimony to adequately support his employer's testimony.

Respondent also argues that the General Counsel failed to make a *prima facie* showing that the filing of the grievances and the charges with the Board was a "motivating factor" in Respondent's decision not to hire

Schmidt. To support this position, Respondent argues that Miller did not know about the grievances Schmidt filed with the Union, but not with the Company. Their argument is not persuasive based on the following: Schmidt wrote to Miller on June 20, 1978, informing him of a previously filed grievance and enclosed the grievance; Schmidt sent another letter to Miller on June 30, 1978, stating that he had not received a reply to his June 20 grievance. There was no question that the Company received the unfair labor practice charge filed by Schmidt on July 26, 1978. On October 13, 1978, Miller wrote to the Union admitting that he had been informed that Schmidt had "once again filed a grievance against us." On November 17, 1978, Miller wrote the Union regarding some scheduling practices and the last paragraph of the letter stated: "It would be appreciated if you would convey the above [information] to Joe Schmidt by a copy of this letter." As discussed above, these missives demonstrate that Miller had knowledge of the grievances Schmidt filed with the Union. Additionally, Respondent contends that Schmidt's repeated complaints to Petroni relative to Petroni's manner of scheduling and overseeing projectionists was the principal basis for its decision not to rehire Schmidt, amply demonstrates knowledge of Schmidt's activities. Therefore, there was no need, contrary to Respondent's contention, for counsel for the General Counsel to call a union representative equally available to both parties to support Miller's own admission plus the documentary evidence that he had knowledge of the grievances Schmidt filed with the Union.

It is further argued that the remoteness in time between the filing of the grievances and unfair labor practice charge and the decision to not hire Schmidt is persuasive that the decision was not in retaliation for Schmidt's alleged protected concerted activities. Remoteness in time from the alleged concerted protected activity is not sufficiently probative to "gainsay discriminatory intent" in all circumstances. See *Butler-Johnson Corporation*, 237 NLRB 688 (1978). Additionally, it is undisputed that Schmidt continued to raise the issues contained in his written grievances; i.e., alleged favoritism in scheduling projectionists. Miller's allegation that continuation of the complaints to Petroni, who was not on the grievance committee, shows a continuation of behavior which was not remote in time from the decision not to rehire Schmidt. Therefore, if these activities are found to be protected concerted activities, there is no remoteness in timing between the filing of grievances and the decision not to hire.

It is contended by Respondent that the General Counsel failed to prove Respondent held antiunion animus. As stated in *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977): "The presence or absence of animus is an aid in determining the motive for the discharge, but not dispositive of itself.[18] The ultimate question always remains: What was the actual motive?"

Respondent also argues that Schmidt's failure to contest his layoff in November 1978, after the grievance and unfair labor practice charges were filed, is akin to an intervening uncontested discharge; citing *Rappaport Exhibits, Inc.*, 224 NLRB 1558 (1976). The *Rappaport* decision was based upon a determination that the intervening discharge was not unlawfully motivated,[19] nor was the decision to not rehire the alleged discriminatee. Specifically, the decision in *Rappaport* found that the failure to rehire was not based, in whole or in part, upon the discriminatee's filing grievances. Accordingly, Schmidt's failure to protest the layoff based upon his uncontroverted testimony that he believed the action was proper at the time is not found to be a waiver of any right as inferred by Respondent and the *Rappaport* decision is found inapplicable to this proceeding.

Also contended by Respondent is that Schmidt's "grievances and gripes" were not protected concerted activity, because they were purely personal in nature and would not benefit other employees. Respondent cited *National Wax Company*, 251 NLRB 1064 (1981), which held:

> In order for activity to be protected by the Act, it must be concerted in nature. In the present case, Stephany's complaint was an individual one. He sought a wage increase only for himself. His *requests were so predicated not on a collective-bargaining agreement but on a promise he claimed had been made to him.* His endeavors were commenced without prior support by fellow workers and no evidence was introduced to show that Stephany ever even attempted to communicate with or involve any other employees in the matter protested.
>
> In certain circumstances, we have found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." [Emphasis supplied.] *Anco Insulations, Inc.*, 247 NLRB 612 (1980). See also *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975). Any indirect relationship to such rights of other employees, however, is too remote to turn a personal protest into a concerted protest. See *Anco Insulations, Inc., supra*; *Tabernacle Community Hospital & Health Center*, 233 NLRB 1425 (1977).

Schmidt's initial complaints were pursuant to article IV of the contract and clearly related to "wages, hours or other conditions of employment or with regard to interpretation of this agreement . . . ." Employees, under Section 7 of the Act, have the protected right to file and process grievances. *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Caterpillar Tractor Company*, 242 NLRB 523 (1979); and *John Klann Moving and Trucking Co.* v. *N.L.R.B.*, 411 F.2d 261, 263 (6th Cir. 1969), cert. denied 396 U.S. 833 (1970).[20]

[18] See further *Terry Industries of Virginia, Inc.*, 164 NLRB 872, 874 (1967), enfd. 403 F.2d 633 (4th Cir. 1968); *N.L.R.B.* v. *March Coal Company, Inc.*, 322 F.2d 311, 313 (9th Cir. 1963).

[19] There is no basis to make a similar finding herein, since the basis for the dismissal of the first charge filed by Schmidt is, properly, not a matter of record.

[20] The merit or lack of merit of the grievance is immaterial and will not be discussed herein. See *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979).

That Petroni was not a member of the grievance committee does not obviate the potential efficacy of the complaints telephonically related to him by Schmidt. The grievance committee hears grievances at the third step; there is no requirement that service upon such members of the grievance committee is a condition precedent to the filing of a grievance. In fact, the contract permits the filing of oral grievances to individuals not necessarily listed as members of the committee, such as filing grievances with theater managers. Accordingly, it is found that, unlike the cited case, *National Wax Company, supra*, the Charging Party's requests were predicated upon the collective-bargaining agreement and hence are protected concerted activities. Additionally, Schmidt tried to communicate with other employees relative to the directive regarding showing the film "Rocky."

Respondent's argument that Miller's testimony that he was not irritated by Schmidt's filing of grievances and the unfair labor practice charges is also found to be unpersuasive.

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the [administrative] trier of fact . . . required to be any more naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference. [*Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). Accord: *Folkins* v. *N.L.R.B.*, 500 F.2d 52, 53 (9th Cir. 1974); *Famet, Inc.* v. *N.L.R.B.*, 490 F.2d 293, 295 (9th Cir. 1973), and cases cited therein.]
>
> Finally, there is a "very narrow standard of review in Board decisions. The Court must affirm any Board decision to the extent that it rests on findings of fact for which there is substantial evidence in the record." [*N.L.R.B.* v. *Broadmoor Lumber Co., supra*, 578 F.2d at 241.]
>
> In fact, in this case, the credited evidence of Petroni's affidavit contains an "outright confession" of unlawful purpose for Respondent's refusal to hire Schmidt which "eliminates any question concerning the intrinsic merits as to . . . the individual discharges . . . or other causes suggested as the basis for the discharge. See *N.L.R.B.* v. *Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958); *N.L.R.B.* v. *Globe Products Corp.*, 322 F.2d 694, 696 (4th Cir. 1963); *N.L.R.B.* v. *John Langen Bakery Co.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied 393 U.S. 1049. See also *Apollo Tire Co., Inc.*, 236 NLRB 1627 (1978).

That Petroni used the term "trouble," but did not specify what acts were exactly encompassed in the term, is also argued by Respondent to indicate the specious nature of the allegations. The use of the term "trouble" is found, in the context of this case, including Petroni's admission in his affidavit, to be a euphemism for Schmidt's concerted activities of grieving about protected subjects as defined in the collective-bargaining agreement and filing the unfair labor practice charge. Accordingly, the use of the term colors the Company's prior decision not to hire Schmidt with discriminatory motivation. See *Roadway Express, Inc.*, 239 NLRB 653 (1978); and *N.L.R.B.* v. *Hertz Corp.*, 449 F.2d 711, 714 (5th Cir. 1971).

Analysis and Conclusions

Section 8(a)(3) of the Act makes it illegal to discourage or encourage membership in any labor organization by discrimination in regard to hire or tenure of employment, or with respect to any term or condition of employment. Section 8(a)(4) of the Act makes it illegal to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." "Discrimination in hiring is akin to discrimination in firing" and is equally violative of Section 8(a)(4) and (1) or Section 8(a)(3) and (1) of the Act as here applicable. See *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 187 (1941). There is no question that refusal to hire is discrimination. Therefore, the motive for the discrimination is the dispositive issue in this proceeding. The test for determining causation for discrimination in cases turning on employer motivation was stated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), as follows:

> First, we shall, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

It is concluded that the General Counsel has made a *prima facie* showing of discriminatory motive, not only by the unusual existence of an admission by Petroni that the filing of grievances and an unfair labor practice charge were the basis for Miller's decision not to hire Schmidt but also by the circumstantial evidence present in the case.[21]

The employer did not initially inform Schmidt that he would not be hired because he was considered incompetent or less competent than others. That this alleged reason was not originally mentioned to Schmidt raises the inference that the alleged reasons for the discharge were pretext. *Electroplating Specialities*, 236 NLRB 534 (1978), and *Inland Motors*, 175 NLRB 851 (1969). Fur-

[21] Inasmuch as evidence of antiunion motivation is seldom available, the Board may infer unlawful intent from the circumstances surrounding the discharge. See *N.L.R.B.* v. *Great Dane Trailer, Inc.*, 383 U.S. 26 (1967); *N.L.R.B.* v. *West Point Mfg. Co.*, 245 F.2d 783, 786 (5th Cir. 1957), and *Texas Aluminum Co.* v. *N.L.R.B.*, 435 F.2d 917, 919 (5th Cir. 1970).

ther, the belated rendering of this reason for the failure to hire is a familiar signpost of discriminatory intent. See *La-Z-Boy Tennessee*, 233 NLRB 1255 (1977). Also, as discussed in the section reviewing Petroni's testimony, the inconsistent explanation and application of seniority in scheduling Schmidt and other projectionists for work is strongly indicative of discriminatory motive. See *Gerald G. Gogin d/b/a Gogin Trucking*, 229 NLRB 529 (1977), enfd. 98 LRRM 2250 (7th Cir. 1978), wherein the court specifically referred to the disregard of seniority.

Other indicia of the Company's unlawful motivation is its vaciliation between stated causes for its decision, such as the unacceptable harassment of Petroni, and the allegation of incompetence, cojoined with this multiplicity of reasons, are factors rendering its claim of nondiscrimination less convincing. The record is devoid of any probative evidence supporting the contended incompetence of the Charging Party. The Charging Party admitted he was criticized for being late and lack of neatness was also mentioned. However, when such critiques were made was not placed in evidence, hence, the proximity of these deficiencies to the adverse action has not been demonstrated. The retention of an alleged incompetent projectionist who was discharged only after lodging a series of complaints regarding wages, hours, or other terms and conditions of employment, cojoined with Petroni's credited testimony that he would have continued scheduling Schmidt, as a very senior employee, but for Miller's instructions, contradicts Respondent's assertion that their reductions in scheduling eliminated the need for Schmidt's services. It is found that the reduction in scheduling did not prevent the assignment of shifts to the Charging Party, including Ohata's schedules, or other relief or casual projectionists. For example, the contention that Respondent met its obligation to Schmidt by offering him Parker's job is contradicted by Petroni's testimony that Respondent subsequently offered Schmidt Ohata's relief schedule at the two drive-in theaters. Where Respondent's Company's avowed basis for action is contradictory and unconvincing, it raises the inference that the real reason a notice is unlawful. See *The Bendix Corporation, Research Laboratories Division*, 131 NLRB 599 (1961); *N.L.R.B.* v. *The Bendix Corp.*, 299 F.2d 308 (6th Cir. 1962), cert. denied 371 U.S. 827. Based on the foregoing, it is concluded that Counsel for the General Counsel has made the requisite *prima facie* showing of discriminatory motive.

Respondent has not met its burden of demonstrating that the same action would have occurred in the absence of the protected conduct. While not specifically argued by Respondent, it is inferred by their evidence that they considered Schmidt's conduct unnecessarily disruptive of Respondent's operations and so infringed upon the Company's right to maintain order and respect as to remove the "protective shield of the Act." *Charles Meyers Co.*, 190 NLRB 448, 449 (1971). The absence of any warning that such behavior could lead to discharge, Petroni's testimony that he continued to be willing to schedule Schmidt despite the alleged repeated difficulties he experienced because of Schmidt's repeated complaining; and, the failure to detail with specificity how Schmidt's actions could be deemed unnecessarily disruptive, render such a contention insufficient to overcome the evidence of illegal motive, including Petroni's outright admission.

As stated in *Prescott Industrial Products Company*, 205 NLRB 51, 52 (1973):

> The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by proper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service. [Citing *Bettcher Manufacturing Corporation*, 6 NLRB 526; *Soconoy Mobil Oil Company, Inc.*, 153 NLRB 1244 (1965).]

The evidence in this case does not support a finding that Schmidt crossed that line; there was no violence or threat of violence nor was there evidence that the activity was engaged in for improper motives or in bad faith. Furthermore, there was no showing that Schmidt's actions were of such a character as to render him unfit for further service.

Accordingly, I find that Respondent violated Section 8(a)(4), (3), and (1) of the Act by refusing to hire Schmidt because he engaged in concerted protected activity, including filing an unfair labor practice charge.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to hire Joseph E. Schmidt since August 15, 1979, because he engaged in concerted protected activity including the filing of grievances and an unfair labor practice charge, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having been found that Respondent discriminatorily failed and refused to hire Joseph E. Schmidt, I shall recommend that Respondent offer him immediate employment to a substantially equivalent position at which he would have been hired had he not been discriminated against, without prejudice to seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would normally have earned from the date of the refusal to hire, less net earnings, during said period. All backpay provided herein shall be computed with interest on a quarterly basis, in the manner described by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[22]

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

The Royal Development Company, Limited, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to hire or otherwise discriminating against employees because of their concerted protected activities, including the filing of grievances and unfair labor practice charges.

(b) Discouraging membership in the Union, or any other labor organization of its employees, by discriminating against them in regard to their hire and tenure of employment or any terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer Joseph E. Schmidt immediate employment to a position at which he would have been employed had he not been discriminated against or, if such position no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights or privileges previously enjoyed, and make him whole for any loss of pay due to the violation against him in accordance with the manner set forth in The Remedy.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decision.

(c) Post at its places of business, including all theaters owned or operated by Respondent, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 20, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."